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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARIE IANNELLI a/k/a MARIE IANELLI
and ANNA JANNELLI,

Petitioner,

– against –

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

Section 240.21 of the New York Penal Law entitled Disruption or Disturbance of Religious Service makes it a Class A Misdemeanor for any person:

> "who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance, or alarm or recklessly creating a risk thereof."

The section creates a special category and provides for greatly increased penalties for the disturbance of religious assemblies over the disturbance of other types of public assemblies, which are punishable as violations under Penal Law § 240.20(4).

1. Is Section 240.21 of the New York Penal Law Unconstitutional under the First and Fourteenth Amendments of

the United States Constitution, because it is vague and overbroad and creates a preference for religion in violation of the Establishment Clause.

2. Can this Court grant the instant Writ and consider the issue on the merits when the New York Court of Appeals has determined that the Petitioner's claim was not preserved for its review because the issue was not raised in the Trial Court.

LIST OF PARTIES

The parties to the instant proceeding are Marie Iannelli a/k/a Marie Ianelli and Anna Jannelli, Petitioner and the People of the State of New York as Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CASES CITED CONT.

CASES CITED CONT.

CASES CITED CONT.

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The Order and Decision of the Appellate Term of the Supreme Court of the State of New York for the Second and Eleventh Judicial Districts affirming the judgment of conviction of the Criminal Court of the City of New York, Kings County, rendered on September 24, 1984 has not yet been officially reported. A copy of said Order and Decision is reproduced herein as Appendix A.

The Order and Decision of the New York Court of Appeals affirming the Order of the Appellate Term has been officially reported at 69 NY2d 684 (1986) and is reproduced herein as Appendix B.

JURISDICTIONAL GROUNDS

The Order of the New York Court of Appeals affirming the Petitioner's conviction was entered December 19, 1986. The Petitioner is therefore timely filing this application for a Writ of Certiorari pursuant to Rule 20 of the United States Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the First and Fourteenth Amendments to the Untied States Constitution.

STATEMENT OF THE CASE

The Petitioner Marie Iannelli was convicted on September 24, 1984 in the Criminal Court of the City of New York, Kings County of the crime of Disruption or Disturbance of a Religious Service (Aggravated Disorderly Conduct), a Class A Misdemeanor under New York Penal Law § 240.21 and was sentenced to a Conditional Discharge. The Petitioner had been acquitted of charges of trespass and discrimination which have also been filed against her. The basis of the Petitioner's conviction was that on September 9, 1983, with intent to cause annoyance and alarm and recklessly creating a risk thereof, she had disrupted an Orthodox Jewish Service by approaching congregants and yelling racial epithets.

The evidence revealed that the

Petitioner was a housewife who had resided for over ten years at a two family dwelling owned by her mother for some 36 years. The dwelling adjacent to the Iannelli home had for many years been utilized as an Orthodox Jewish Synagogue. The two premises share a common eight foot driveway. Around 1977, Rabbi Milstein and his family took over the operation of the Synagogue and moved into the top floor. Soon thereafter, the Rabbi opened a school for some 26 children in the Cellar of the building. Because of the large number of persons and children utilizing the Synagogue, the Iannelli family became constantly bothered with noise and children running around their property. Mrs. Iannelli made numerous complaints to authorities without success and when she attempted

to discuss the problem with the Rabbi she was told "to sell her house". Thereafter, Mrs. Iannelli stated that she had continual difficulties with the Synagogue and a cross which she had on her door was spat upon and she was harassed by members of the congregation.

Nathan Sheritof, a member of the Jewish faith, testified during trial, that he lived across the street from the Iannellis' and was a long time friend of the family. Mr. Sheritof stated that on two occasions, he was harassed by members of the Synagogue because of his friendship with the Iannellis' and was told on one occasion by a group of young people from the Synagogue that they were going to "throw him down the sewer" and on another occasion was admonished by the Rabbi because he was "talking to a Shiksa."*

* Meaning a Woman Gentile.

With respect to the incident, of September 9, 1983, which is the subject of the Petitioner's conviction, Mrs. Iannelli at about 10:00 a.m. that morning had gone outside to complain to members of the congregation regarding the fact that they had left baby carriages on her property while they were attending services, and that they were blocking her driveway so that she was unable to get her car in and out. The Prosecution's own witnesses acknowledged that some 40 to 60 people were attending the Synagogue Services that day and that several children were outside playing in the driveway. Rabbi Moshe Milstein also admitted during the trial that garbage cans were kept on the side of the driveway and that cars were parked there so that Mrs. Iannelli would not have been able to get her car in and

out.

An argument thereafter ensued outside on the common driveway, between some of Rabbi Milsteins relatives and Mrs. Iannelli regarding her complaints to them. The People's own witnesses stated that they heard shouting not only from the Petitioner, but also from members of the Congregation. The commotion lasted for some 15 to 20 minutes and subsequently ended with the congregants returning to the Synagogue. About an hour later another incident again occurred outside on the driveway involving Rabbi Gnatt, Rabbi Milstein's grandfather, in which it was claimed that Mrs. Iannelli yelled racial and religious epithets. Rabbi Gnatt acknowledged that during the incident, he raised his hand at Mrs.Iannelli and she ran to the end of the driveway yelling that he was attacking her.

Subsequently, his grandsons had to drag him back into the Synagogue. Assistant District Attorney Robert Sullivan who was called as a defense witness stated that he was told that Rabbi Gnatt had become rather upset and had gone after or toward Mrs. Iannelli and had to be restrained by some members of the congregation. The Petitioner denied making any racial remarks and stated she was the one attacked by Rabbi Gnatt. The Petitioner's account of the incident was supported by testimony of her mother and husband. In fact, Mrs. Iannelli was the one who called police after the incident requesting that summonses for harassment be served on members of the Milstein family. On September 15, 1983, almost a week after the incident, the Milsteins went to the Brooklyn District Attorney's Office of Elizabeth Holtzman and

lodged a complaint against the Petitioner to the effect that she was disturbing their religious service, although no such claim had been reported to the police on the day of the incident.

After deliberating many hours and expressing difficulty in arriving at a verdict, the jury convicted the Petitioner of Disruption or Disturbance of a religious service under Penal Law Section 240.21 and acquitted her of the Discrimination and Trespass Charges. At the time of sentence, the Petitioner again reiterated her innocence of the charges in question.

In the trial court, the Petitioner did not specifically raise the issue of the constitutionality of the New York State Penal Law Section under which she was convicted.

On appeal to the Appellate Term, the Petitioner's conviction was affirmed by a 2-1 vote.* In the Appellate Term, the constitutionality of New York's Penal Law Statute was expressly challenged on the grounds raised herein, and the Appellate Term decided the issue on the merits, finding that the Statute was constitutional.

The New York Court of Appeals, however, held that the Petitioner's claim that the statute violated the due process and establishment clauses of the United States Constitution under the First and Fourteenth Amendment was not preserved because of the failure to raise the issue in the trial court. (See Appendix A and B).

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* The dissenting judge concluded that the People had not established intentional or reckless conduct beyond a reasonable doubt, so as to warrant the Petitioner's conviction.

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the New York State Penal Law Provision under which the Petitioner was convicted violates the First and Fourteen Amendements in that it is over broad and vague and creates preferential treatment for religion in violation of the Establishment Clause.

Vagueness and Overbreath

It has been clearly held that a statute must inform a reasonable man of what is prohibited and that in order to be valid, the statute must be informative on its face. A statute, which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

differ as to its application violates the first essential of due process of law. See Connolly v. General Construction Co., 269 US 385, 391 (1926); Papa Christou v. City of Jacksonville, 405 US 156 (1972); United States v. Petrillo, 332 US 1, 6; United States v. Harriss, 347 US 612, 617); Grayned v. City of Rockford, 408 US 104, 108-109 (1972).

In the case at bar, an examination of Penal Law Section 240.21 and its legislative history clearly reveals that it is unconstitutionally void for vagueness under the principles enunciated above. The statute, first of all is one of only three in the entire revised Penal Law which was neither drafted nor sponsored by the Temporary Commission on Revision of the Penal Law and Criminal Code. In fact,

the Temporary Commission and other leading professional organizations* who recognized its constitutional deficiencies opposed its passage.

The statute itself is so poorly drafted that although its title is listed as Disruption or Disturbance of Religious Service, the body of the law designates the offense as Aggravated Disorderly Conduct.

In addition, the use of subjective terms such as "unreasonable noise" or "disturbance" which cause "annoyance" or "alarm" make enforcement unconstitutionally dependent upon the "malice or animosity of a cantankerous

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* The Statute was also opposed by the Judicial Conference, The Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York, and the New York Civil Liberties Union. See Governors Bill Jacket L. 1967, Ch 614.

neighbor". See People v. NY Trap Rock Corp., 57 NY2d 371 (1982). This Court in Coates v. Cincinnati, 402 US 611, 614 (1973), struck down an annoyance statute as being unconstitutionally vague. The Court appropo to the situation herein stated:

> "[2] Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' Connally v. General Construction Co., 269 US 385, 391, 70 L. Ed. 322, 328, 46 S Ct. 126."

In addition, the subjective terms used in the statute are in no way limited or narrowed so as to enable courts to conform them to constitutional standards. On the contrary, the pervasive nature of the catchall effect of the statute makes it capable of ad hoc and discriminatory enforcement. The statute sweeps so broadly that it also punishes innocent conduct and conduct protected by First Amendment Freedom. Commentators in New York have pointed out these various defects in the law. Thus, in sharply disapproving of the Bill, the Temporary Commission on Revision of the New York Penal Law stated:

> "We note also that there are a number of technical deficiencies in the proposed section. For example, under §240.20(4) a person is guilty of

> disorderly conduct when, with intent to cause annoyance, and without lawful authority, he disturbs a meeting of persons. Thus, an actual disturbance of the meeting is an essential element of this particular kind of disorderly conduct. The proposed section, on the other hand, provides that a person is guilty of 'aggravated disorderly conduct' if he 'makes[sic]... disturbance'while within 100 feet of a 'lawfully assembled religious service.' There is no requirement that the offender's conduct in fact disturb the service, or that his conduct be coupled with an intent to disturb the service or that it recklessly create a risk thereof.
>
> The Chairman and the legal staff, accordingly, recommend executive disapproval of this bill." (See Governor's Bill, Jacket L 1967 Ch. 614).

The Practice Commentary to McKinney's New York Penal §240.21 also states in this regard:

> "This section by its terms permits conviction for this relatively serious offense of a person standing more than thirty yards away from a church who, without even being aware that services are in progress, causes an unrelated street disturbance which incidentally happens to annoy some of the parishioners."

The New York Civil Liberties Union in its opposition to the statute also aptly pointed out:

> "The bill is both unnecessary and unconstitutionally vague. It is unnecessary because the Penal Law presently proscribes conduct which unlawfully disturbs the peace, whether at a religious service, a public school, or at a streetcorner. The present law is entirely adequate to cover the conduct at which this bill seems to be directed.
>
> The bill is vague because by its sweeping and undefined terms it prohibits innocent as well as unlawful activity. We can only speculate as to its scope. For example, what is unreasonable noise as opposed to noise which is reasonable?

> Is it to be measured by decibels or by its effect on the listener? Does a minister violate this section when in stentorian tones he importunes his congregation to follow the path of righteousness and therefore 'alarms' his flock with the horrible alternatives he suggests? Is the section violated by a bystander who voices his objection to the proselytizing of a black muslim minister at a street corner and thereby 'annoys' the assemblage? Or will the state be permitted to determine for itself that such a meeting is not a 'religious service.'
>
> A criminal statute must be carefully drafted so as to exclude conduct which the state has no right to punish and so that reasonable men do not have to guess at its meaning. This poorly drafted statute does not meet that standard. We urge its defeat.

See Governor's Bill Jacket L.

1967 Ch. 614.

From the numerous examples given above, it is clear that there are no adequate guidelines provided to insure that the state is protecting only legitimate interests, rather the statute sweeps broadly taking within its reach all types of innocent and unintentional conduct.

It must also be noted that the Statute makes either intentional conduct or reckless conduct actionable at the same level and in the case at bar the Petitioner was charged with both and the jury allowed to consider both types of culpability. The jury was thus asked to speculate and conjecture as to what type of conduct might have been involved, and the Appellate Term majority itself engaged in this type of speculation, by concluding that the Petitioner acted "at least recklessly".

Further, as applied to the Petitioner, the Statute sought to prohibit not conduct, but speech, and speech which occurred not at a religious service, but many feet away, while she was standing in her own driveway.*

The statute thus is also overbroad in its reach since it infringes upon First Amendment rights. See Zwickler v. Koota, 389 US 241, 250 (1967); NAACP v. Alabama, 377 US 288, 307 (1964).

It has long been held that because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 US 296 (1940). Standards of permissible statutory vagueness

* Since the jury acquitted the appellant of Trespassing it clearly found that she was on her own property at the time.

are thus strict in the area of free expression. Smith v. California, 361 US 147 (1959); Winters v. New York, 333 US 507 (1948); NAACP v. Button, 371 US 415 (1963).

In Broderick v. Oklahoma, 413 US 601 (1973), this Court reviewed the history and reasons for these fundamental principles and stated at page 610:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment **that** a particular mode of expression has to give way to other compelling needs of society. Herndon v. Lowry, 301 U.S. 242, 258, 57 S.Ct. 732, 739, 81 L.Ed. 1066 (1937); Shelton v. Tucker , 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960); Grayned v. City of Rockford, 408 U.S. at 116-117, 92 S.Ct at 2303-2304. As a corollary, the Court has altered its

traditional rules of standing to permit-in the First Amendment area - 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister, 380 U.S. at 486, 85 S. Ct., at 1121. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but becuase of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). See Cohen v. California 403 U.S. 15, 91 S.Ct. 1780 29 L.Ed.2d 284 (1971); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Brandenburg v. Ohio, 395 U.S. 444 89 S.Ct. 1827, 23 L. Ed2d 430 (1969);

> Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). In such cases, it has been the judgment of this Court that possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

The New York Penal Law Section 240.21, as written and as interpreted by the above-mentioned legal scholars who have condemned its passage, makes a serious criminal conviction possible from the mere utterance of words which may happen to annoy others. The utterance of these words does not even have to occur within the presence of the disturbed group but may occur, as happened herein, on the defendant's own property. Further, the annoyance or disturbance can occur from reckless as

well as intentional conduct. The chilling effect on speech from this overbroad and poorly drafted statute is enormous.

This Court in Papisti v. Board of Curators of the University of Missouri, 410 US 667 (1973), clearly stated that the fact that certain modes of expression may be annoying to others does not require an individual to forfeit his right to make such assertions.

Similarly in Terminello v. City of Chicago, 337 US 1 (1949), this Court reversed a conviction for disorderly conduct where a defendant addressed a public meeting and attacked "Communist Zionistic Jews". The trial judge had charged the jury that the defendant could be convicted for speech "that stirs the public to

anger, invites dispute, brings about a condition of unrest, or creates a disturbance." Writing for the majority, Mr. Justice Douglas said:

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute [Chaplinsky v. New Hampshire] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . There is no room under our Constitution for a more restrictive view. For the alternative would lead

> to standardization of ideas either by legislatures, courts, or dominant political or community groups.' 337 US at 4-5."

Interestingly, in the case at bar, the Court below charged the jury in a similar manner to that found constitutionally offensive in Terminello. Thus, the court at pages 680, 681 of the trial record stated:

> "Now, unreasonable means a noise, whether made by mechanical means or by shouts and outcries which is extremely loud and excessive and which tend to annoy, harass, molest, disturb and discomfort others.
>
> Disturbance means an active annoyance, irritation or interference with another's tranquility or which causes disorder or commotion. . .
>
> Now, to cause annoyance is to cause disturbance and molestation or discomfort on another person. And to alarm is to frighten or

> cause anxiety to another person by threatening danger or alarm." (emphasis added)

Thus, according to the trial court's charge mere discomfort caused by the words in question would become actionable.

The Constitutioanl infirmity of Penal Law Section 240.21 has in fact been commented upon by a distinguished New York Jurist now serving on the State's Appellate Division. Thus, in People v. Steele, 70 Misc 2d 351 (1972), Judge Rosenberger remarked:

> "A clear and well researched argument is made that the statute is overbroad and thereby void". (Coates v. City of Cincinnatti, 402 US 611; NAACP v. Button, 371 US 415)."

It is thus clear that the Statute is unconstitutional on its

face and as applied to the Petitioner herein. It should therefore be declared null and void.

Preferential Treatment For Religion In Violation Of The Establishment Clause Of The First And Fourteenth Amendments.

New York's Disorderly Conduct Statute under Penal Law Section 240.20(4) provides for punishment for any person who disturbs any lawful assembly or meeting of persons. Section 240.20 is categorized as a violation carrying a maximum penalty of fifteen days. It was the specific intent of the revisers of the Penal Law to treat all disturbances of meetings equally and to cover them in the violation category. The legislature however, over the direct opposition

of the revisers, added Penal Law Section 240.21, making it a Class A Misdemeanor crime to disturb an assembly of persons which happened to be a religious service, and specifically provided for an increased penalty of up to one year in jail.(See Appendix C)

In disapproving of Penal Law Section 240.21, the Temporary Commission on Revision of the Penal Law stated:

> "The bill is unnecessary and should be disapproved. The conduct dealt with in this bill is adequately proscribed in revised Penal Law §240.20, subdivision 4. There are no compelling reasons for categorizing as a Class A misdemeanor certain disorderly conduct involving a religious service. One of the chief purposes and accomplishments of the revised Penal Law was the elimination of this kind of specificity." (Governor's Bill Jacket L 1967, Ch. 614).

In expressing similar disapproval of the statute, the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York pointed out:

> "The Committee sees no reason to alter the general scheme established in Section 240 by making the disturbance of a religious service a vastly more serious offense than the disturbance of lawful assemblies for a variety of other solemn and important purposes."

See Governor's Bill Jacket L 1967, Ch. 614, Leg. Bulletin, No. 38.

Judge Rosenberger, in People v. Steele, 70 Misc 2d 351 (Crim. Ct., N.Y. Cty. 1972) in reviewing the history of Penal Law Sections 240.20 and 240.21 points out the great disparity which would result from their application and states:

> "The revisers of the Penal Law intended to treat disturbances of all meetings equally. They did not intend to grant special preferences to religious meetings over all others. This, however, the Legislature did
>
> . . .
>
> The matter may be brought into focus by considering the fact that disturbance of a funeral conducted in an undertaking establishment in a secular manner is a violation. Disturbance of a similar funeral different only in that a clergyman officiates, is punished by a sentence more than 24 times as harsh."

The Legislature by the enactment of Penal Law Section 240.21, has clearly manifested a preference for religion and treats the disturbance of a religious service 24 times more severely than the disturbance of any other public assembly. In addition, the disturbance of a religious service by being classified as

a Class A Misdemeanor leaves a defendant with the stigma of a serious criminal record while a disturbance of any other type of public assembly is classified as a non-criminal offense which offers the possibility of the sealing of criminal records under Criminal Procedure Law Section 160.55.

The Legislature, thus placed religious assemblies in a special and exalted category over all other public gatherings. Such a situation, is specifically barred by the express First Amendment prohibition against Government partiality toward religion.

Judge Rosenberger, in People v. Steele, supra, in discussing Section 240.21 clearly recognized the constitutional infirmity of the statute and stated:

> "It might well be argued, from the foregoing that this statute is one in aid of religion. It has been held time and again by the Supreme Court that neither Congress nor the States may make any laws which aid one religion, aid all religions, prefer one religion over another, or even prefer religion over nonreligion. (Everson v. Board of Educ., 330 U.S. 1; Abington School Dist. v. Schempp, 374 U.S. 203)".

In Everson , supra, this Court in reviewing the historical sources* of the establishment clause and the reasons for its enactment concluded:

*The Court relied heavily on the views of James Madison, the author of the clause as expressed in his Memorial and Remonstrance. As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority. For him religion was a wholly private matter beyond the scope of civil power either to restrain or to support.

> "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . .
>
> In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state. Reynolds v. United States, 98 US 164."

In School District of Abington Township Pennsylvania v. Schempp, 374 US 203, 218, 226 (1963), the Court aptly viewed the purpose of the establishment clause as requiring:

> "the state to be neutral in its relations with groups of religious believers and non believers.
>
> . . . . .
>
> In the relationship between man and religion, the State is firmly committed to a position of neutrality. . .

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. that is to say that to withstand the strictures of the Establishment Clause there must be a secular

> legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, supra."

See also, McGowan v. Maryland, 366 US 420 (1961); Illinois ex rel McCullum v. Board of Education, 333 US 203 (1948); Engel v. Vitale, 370 US 421 (1962).

In recent years, this Court has relied upon a three pronged test as enunciated in Lemon v. Kurtzman, 403 US 602 (1971), for determining whether the Establishment Clause has been violated by governmental action. In Lemon supra, this Court stated at pages 612, 613:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal

> or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion'. Walz v. Tax Commission, 397 U.S. 664, 674 (1970)."

Only recently this Court utilizing the Lemon criteria continued to adhere to a strict policy of governmental neutrality in the field of religion. Thus, educational programs in Michigan and New York which sent public school teachers to provide remedial or enrichment instruction to educationally deprived parochial school students were struck down and an Alabama moment of silence law in the public schools was similarly declared unconstitutional*

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* See Grand Rapids School District v. Ball, 473 US____, 87 LE 2d 267 (July,1985) Aguilar v.Felton, 473 US___,87 LE2d 290 (July,1985); Wallace v. Jaffee,472 US___, 86 LE 2d 29 (June, 1985).

This Court also proceeded to invalidate a Connecticut Law that gave employees an unqualified right not to work on their chosen Sabbath.*

In these four recent decisions, this Court reaffirmed the fundamental principles recited in Everson supra, and warned that State legislation which did not clearly have a secular purpose or which sought to advance religion and to entangle the government in religious affairs would be deemed unconstitutional.

Thus, in Estate of Thornton v. Caldor, Inc., 472 US ____, 86 LE 2d 557 (1985), this Court stated at page 562:

* Estate of Thornton v. Caldor Inc., 472 US ___, 86 LE 2d 557 (June, 1985).

> "to pass constitutional muster under Lemon, a statute must not only have a secular purpose and not foster excessive entanglement with religion, its primary effect must not advance or inhibit religion."

Similarly, in Wallace v. Jaffee, 472 US _____, 86 LE 2d 29 (1985), this Court observed at page 43:

> "The First Amendment requires that a Statute must be invalidated if it is entirely motivated by a purpose to advance religion."

The majority opinion in the Appellate Term did not ever consider the most recent Supreme Court pronouncements discussed above and instead erroneously relied upon Lynch v. Donnelly, 465 US 668, 104 S.Ct., 1355(1984), wherethis Court upheld the right of a city to include a nativity scene in its annual christmas display.This Court,

in that case decided by a 5-4 vote only the narrow issue of whether there was a secular purpose in including such a scene as part of the general holiday season. This is totally different from the case at bar, where the Statute in question, has absolutely no secular purpose, but which in fact seeks to grant preferential treatment to religion.

While a violation of any one of the three Lemon criteria would cause a statute to be declared unconstitutional (see Wallace v. Jaffee, supra, at page 43), in the case at bar, the Statute in question, violates all three of the Lemon standards and clearly evidences a motivation to advance religion.

Since, Penal Law § 240.20, already covers the disruption of all public assemblies, the additional enactment of 240.21 clearly has no

secular purpose and in fact, its sole aim was to place religious assemblies in an exalted and preferential position. This is obvious from the fact, that the sole distinguishing feature between § 240.20 and 240.21 is that a religious service is disturbed. The state by the enactment of this special protection for religion has excessively entangled the government in religious affairs by placing the vast law enforcement facilities of the state at the special disposal of religion.* By punishing the

*Interestingly, in the case at bar, the normal procedure in New York City regarding the filing of a disorderly conduct or harassment complaint by one neighbor against another is for the complainant to pursue the matter on their own by going to a special summons part. In the instant case, however, when the Milsteins went to the District Attorney's Office one week after the incident in question, an A.D.A. was assigned to conduct a special investigation of the matter. In the busy Brooklyn Office, it appears unlikely that such special attention would have been given to an ordinary violation or misdemeanor case, but for the fact that a Religious Organization was involved.

disruption of religious assemblies 24 times more severely than the disruption of other public gatherings, the state has in effect placed itself in the position of the Knight Templars of Religion.

Under all the circumstances, Penal Law § 240.21, is violative of the Establishment Clause of the First Amendment and should be declared Unconstitutional.

Because New York Penal Law Section 240.21 clearly violates Federal Constitutional Rights under the First and Fourteenth Amendments, this Court should grant the instant Writ even though the New York Court of Appeals determined that the claim had not been preserved for review because it was not raised in the Trial Court. This Court has held that the adequacy of a State Court's finding that a federal question was not presented in time is

an issue to be determined by this Court, after an inquiry as to whether the State decision rests upon a fair and substantial basis. See Michel v. Louisiana, 350 US 91 (1955); Lawrence v. State Tax Commission, 286 US 276 (1932); Staub v. City of Baxley, 355 US 313 (1958).

Although, in the case at bar the issue was not raised in the trial court, it was fully raised and discussed in the arguments before the Appellate Term and the New York Court of Appeals. In fact, the Appellate Term majority decided the issue on the merits citing this Courts' decision in Lynch v.Donnelly, supra, and a decision of the high court of New Mexico, to wit, State v. Vogenthoeler, 548 P2d 112 (1976). This Court in Whitfield v. State of Ohio, 297 US 431 (1936) held that a Constitutional question passed upon a State Appellate

Court could be considered by this Court even if the issue was not properly raised in the trial court.

It must also be noted that the issue of the Constitutionality of a statute is different from the raising of procedural or other defects during a trial. The Constitutionality of a statute must always be eventually determined by the higher appellate courts and is not an issue which can be quickly corrected and determined if brought to the trial courts attention. In addition, it does not require the development of a factual record in the trial court below in order to allow appellate courts to determine the issue. In the case at bar, the constitutionality of the statute on its face is being challenged and this Court has all the necessary information to decide the

issue. Significantly, the prosecutor in the Appellate Term and in the New York Court of Appeals never argued the preservation issue and the New York Court of Appeals in relying on that issue went contrary to its past position on the issue. As this Court observed in Street v. New York, 394 US 576 (1969), the New York Court of Appeals had often previously stated that when dealing with a deprivation of a fundamental constitutional right, the issue could be raised for the first time on an appeal. See People v. McLucas, 15 NY2d 167, 172 (1964); People v. Banks, 53 NY2d 819 (1981). In fact, in People v. Bergerson, 17 NY2d 398 (1966), the New York Court of Appeals had proceeded to decide the issue of the Constitutionality of a

Penal Statute even though the Appellate Division had originally refused to decide the issue because the matter had not been raised in the trial court. See People v. Bergerson, 24 AD2d 772 (3rd Dept., 1965).

The application of the preservation doctrine by the New York Court of Appeals to the issue herein was totally unwarranted and in effect was an evasion of its responsibility to deal with a claim involving deprivation of fundamental First Amendment Freedoms.

It must be noted, that we are dealing here with basic First Amendment Rights, which involve interests of society as a whole and not merely the rights of the individual Petitioner. In such cases, this Court has clearly recognized that exceptions must be made to the ordinary rules regarding preservation

standing and waiver. Thus, this Court at 430 US 955; 91 S. Ct. 2292 (1971) affirmed a decision of the Federal District Court in Johnson v. Sanders, 319 F. Supp 421 (Dist. Ct., Conn., 1970), wherein that Court aptly stated in footnote 32 at page 433:

> "The Establishment Clause is the guardian of the interest of society as a whole and is particularly vested with the rights of minorities. It cannot be waived by individuals or institutions."

This Court under 28 USC § 1257(3) has greater authority under its Writ of Certiorari jurisdiction than its Appellate jurisdiction to review the Constitutional validity of State Statutes, which have been drawn in question. See Richmond Newspaper Inc. v. Virginia, 448 US 555,562(1980). In the case at bar,

the issues in question were brought to the attention of the State Courts at an earlier enough time for them to act on the matter. The refusal of the New York Court of Appeals to decide this fundamental and important issue by raising an illogical and unwarranted preservation barrier, should cause this Court as the ultimate guardian of Federal Constitutional Rights to grant the instant Writ in order to correct the serious Constitutional deprivations which have occurred and will continue to occur under the present New York Statute.

Since other states besides New York have enacted Penal Statutes which grant religious services and religious property preferential protection, it is of the utmost importance that this Court determine the

Constitutionality of such Statutes at the earliest possible time. The instant Writ should therefore be granted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX A -

ORDER OF THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE 2nd and 11th JUDICIAL DISTRICTS, HELD IN KINGS COUNTY, ON THE 25th DAY OF MARCH, 1986.

HON. EDWIN KASSOFF, Justice Presiding
HON. JOHN A. MONTELEONE,
HON. ALFRED D. LERNER.

Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

MARIE IANNELLI a/k/a MARIE IANELLI and ANNA JANNELLI,

Appellant.

The above named MARIE IANNELLI a/k/a MARIE IANELLI and ANNA JANNELLI, the defendant herein, having appealed to this Court from a judgment of the Criminal Court of the City of New York, County of Kings rendered on the 24th day of Sept., 1984, convicting him of the following and imposing sentence as

follows: 240.21 P.L. - Conditional Discharge and the said appeal having been argued by Spiros A. Tsimbinos, Esq., of counsel for the appellant, and argued by Thomas E. Greiff, Esq., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction is affirmed. Kassoff, J.P. and Lerner, J. concur. Monteleone, J. dissents and votes to reverse the conviction in a separate memorandum.

JOHN A. CAHILL

CHIEF CLERK
Appellate Term.

APPENDIX A - CONT.

DECISION OF THE APPELLATE TERM - DATED MARCH 25, 1986.

Appeal from judgment convicting the defendant of aggravated disorderly conduct and imposing sentence.

Judgment of conviction affirmed.

When the proof is viewed most favorably to the People, it is our opinion that the question of whether defendant acted with requisite mental culpability was properly left to the jury. In this regard, the record shows that the defendant, on two occasions on the day in question engaged in conduct calculated to provoke the members of a congregation who were peaceably assembled on synagogue property and that on at least one occasion defendant uttered racial epithets of so reprehensible a character as to clearly disclose her intent to provoke the emotions of the people to whom

such racial epithets were addressed and which did, in fact, disturb the Rosh Hoshana services which had been in progress at the time. In view of this, it cannot be said as a matter of law that there was insufficient evidence that defendant did not act at least "recklessly" within the meaning of the statute (see Penal Law § 15.05). We are also of the opinion that the statute was neither vague nor overly broad and that it did not violate the principle of equal protection (see Lynch v. Donnelly, ___US___, 104 S. Ct 1355; reh den, ___US___, 104 S Ct 2376; People v. Bakalas, 59 NY2d 51; State v Vogentholer, 89 NM 150, 548 P2 112; 90 ALR 3d 1128). We find no merit to defendant's remaining contention.

Kassoff, J.P. and Lerner J. concur.

Monteleone, J. dissents and votes

to reverse the conviction in a separate memorandum.

Monteleone, J. dissents and votes to reverse the judgment of conviction on the ground that the People failed to establish defendant's guilt beyond a reasonable doubt.

The defendant, a housewife and mother resided in a two family home adjacent to a dwelling utilized as an Orthodox Jewish Synagogue. The two premises share a common eight foot driveway. Rabbi Milstein and his family resided in the top floor of the synagogue building with his family.

The incident leading to defendant's conviction arose as a result of two baby carriages which were left in this common driveway and blocking the passageway. An argument ensued between the defendant and the rabbi's wife and sister with respect to the baby car-

riages and defendant's inability to move her automobile in order to go shopping with her daughter. Unfortunately, the day in question was Rosh Hashanna and services were being conducted in the synagogue. About an hour after the first shouting incident another argument ensued in and about the driveway between Rabbi Gnatt and the defendant. The testimony disclosed that loud voices were heard inside the synagogue while services were being performed.

The defendant was charged in a criminal court complaint brought by Rabbi Milstein and Rabbi Gnatt with Trespass (Penal Law 140.05), Discrimination (Civil Rights Law 40-c) and Disruption or Disturbance of a Religious Service (Penal Law 240.21). The jury acquitted defendant of Tespass and Discrimination but convicted her of Disruption or Disturbance of a Religious

Service under Penal Law 240.21 which provides as follows:

> "A person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.
>
> Aggravated disorderly conduct is a class A misdemeanor."

The evidence does not establish that defendant knew that religious services were being conducted at the time of the arguments. The testimony also discloses that the loud voices heard inside the synagogue consisted not only of defendant's voice but also of Rabbi Gnatt and Rabbi Milstein's wife and sister. Clearly, all of the participants to these verbal arguments joined in the disturbance and the element of provocation was present during both incidents.

An emotional element of prejudice was raised during the course of the trial when defendant was accused of using offensive language towards the Jewish race. Certainly, the use of offensive language towards any race or religion is to be deplored and not condoned. Whether this discriminatory language influenced the juryin its verdict is difficult to say. Nevertheless, I find that the unfortunate set of circumstances, emanating from two baby carriages blocking a common driveway does not warrant the conviction. Viewing the evidence most favorable to the people I conclude that defendant's conduct may have been intemperate and deplorable but failed to establish, beyond a reasonable doubt, the requisite intent under Penal Law Sections 15.05 (subd. 1) nor reckless conduct (subd. 3). (Also see

People v. Steele, 70 Misc. 2d 351).

Accordingly, I would reverse and set aside the judgment of conviction based upon the law and facts and dismiss the information.

APPENDIX - B

ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, DATED DECEMBER 19, 1986.

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

MARIE IANNELLI, a/k/a MARIE IANELLI and ANNA JANNELLI,

Appellant.

The appellant in the above entitled appeal appeared by Spiros A. Tsimbinos, Esq., the respondent appeared by Hon. Elizabeth Holtzman, District Attorney, Kings County.

The Court, after due deliberations, orders and adjudges that the order affirmed in a memorandum. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Criminal Court, Kings County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW,
CLERK OF THE COURT

Court of Appeals, Clerk's Office Albany, December 19, 1986.

APPENDIX - B CONT.

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, DATED DECEMBER 19, 1986.

The order of the Appellate Term should be affirmed.

Viewed in a light most favorable to the People, the evidence adduced at trial was sufficient to establish defendant's commission of aggravated disorderly conduct (Peanl Law §240.21).

Defendant's claim that the statute violates the Due Process and Establishment Clauses of the United States Constitution (US Const, 14th and 1st Amends) has not been preserved for our review. Defendant did not move pursuant to CPL 170.30(1)(a) and CPL 170.35(1)(c) within the time prescribed by CPL 170.30(2) and CPL 255.20(1) for dismissal of the accusatory instrument (compare, People v. Bakolas, 59 NY2d 51, 53), and indeed never made her position

on this issue known to the trial court before, during or after the trial. As we noted in People v. Thomas (50 NY2d 467, 473) "the rule requiring a defendant to preserve his points for appellate review applies generally to claims of error involving Federal constitutional rights". The rule was applied in People v. Dozier (52 NY2d 781, 783) to foreclose a constitutional challenge to the statute defining third degree rape (Penal Law §130.25[2]) based on alleged discrimination on account of sex and violation of due process because it eliminates the mens rea element (another constitutional challenge to the statute, which was properly raised, was considered and rejected) (see, also, People v. Drummond, 40 NY2d 990, cert denied sub nom. New York v. Luis J., 431 US 908).

We have examined defendant's remaining contention and find it to be without merit.

* * * * * * * * * * * * * * * * * * * *

Order affirmed in a memorandum. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander, Titone and Hancock concur.

Decided December 19, 1986.

APPENDIX C-

RELEVANT NEW YORK PENAL LAW SECTIONS:

Section 240.20(4)-Disorderly Conduct.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: Without lawful authority, he disturbs any lawful assembly or meeting of persons. Disorderly Conduct is a violation.

Section 240.21 - Disruption, or Disturbance of religious service.

A person is guilty of aggravated disorderly conduct, who makes unreasonable noise or disturbance while at a lawfully assembled religious service or within one hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.

APPENDIX C- Cont.

Aggravated disorderly conduct is a Class A misdemeanor.